Supreme Court, U.S.
FILED
OCT 14 1992
OFFICE OF THE CLERK

(5)

No. 92-433

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

SEARS, ROEBUCK & COMPANY,

Petitioner,

v.

LOUIS J. BARATTINI, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

Counsel for *Amicus Curiae*

Date: October 14, 1992

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a federal district court is powerless to retain jurisdiction over a case founded on diversity jurisdiction when the plaintiff adds a non-diverse defendant against whom he adequately alleges a cause of action and keeps that defendant in the case for at least a year, even when the district court finds that the defendant was added fraudulently, without intent to prosecute the cause of action, in a "blatant attempt to circumvent the federal court's exercise of diversity jurisdiction."

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION . . . 5

I. THE COURT OF APPEALS'S DECISION SERIOUSLY MISREADS CONGRESSIONAL INTENT IN ADOPTING THE ONE-YEAR LIMITATION PERIOD FOR REMOVAL OF CASES TO FEDERAL COURT 5

II. MR. BARATTINI'S JOINDER OF MR. SOILEAU AS A DEFENDANT FOR THE PURPOSE OF DEFEATING DIVERSITY JURISDICTION WAS "FRAUDULENT" AS THAT TERM HAS TRADITIONALLY BEEN UNDERSTOOD 8

III. THE COURT OF APPEALS'S DECISION DEPRIVES OUT-OF-STATE DEFENDANTS OF A MUCH-NEEDED SHIELD AGAINST HOME-TOWN VERDICTS 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases:

Abels v. State Farm Fire & Cas. Co.,
770 F.2d 26 (3d Cir. 1985) 10

B, Inc. v. Miller Brewing Co.,
663 F.2d 545 (5th Cir. Unit A 1981) 9

Burlington Northern R. Co. v. Ford,
112 S. Ct. 2184 (1992) 2, 11

Poulos v. Naas Foods, Inc.,
959 F.2d 69 (7th Cir. 1992) 7

Powers v. Chesapeake & Ohio Railway,
169 U.S. 92 (1898) 5

Wilson v. Republic Iron & Steel Co.,
257 U.S. 92 (1921) 8-10

Statutes:

28 U.S.C. § 1332 . . . . . 3, 6

28 U.S.C. § 1441(b) 11

28 U.S.C. § 1446(b) 4-8

Judicial Improvements and Access
to Justice Act of 1988 6-7

Page

Miscellaneous:

H.R. Rep. No. 889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 5982 (1988) . . 6-7

1A *Moore's Federal Practice*, Para. 0.168[3.-5-7] (1985) 7

14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3721 (1976) 11

14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3723 (1976) 10

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-433

SEARS, ROEBUCK & COMPANY,

Petitioner,

v.

LOUIS J. BARATTINI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the interests of the free enterprise system. To that end, WLF has appeared before this Court as well as other state and federal courts in cases of interest to the business community.

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as the notion has

spread that businesses have infinitely deep pockets from which they can compensate individual citizens for any and all misfortune that may befall them. Judges and juries who have succumbed to that notion are particularly apt to assign no-fault liability to corporations based outside the forum state. Accordingly, WLF has filed briefs in numerous cases that challenge state judicial procedures that discriminate against out-of-state defendants. *See, e.g., Burlington Northern R. Co. v. Ford*, 112 S. Ct. 2184 (1992).

The federal court's removal jurisdiction provides one very important check upon discrimination against out-of-state defendants. WLF is concerned that the decision below, by turning a blind eye to fraudulent measures designed to defeat federal court removal jurisdiction, will cause great harm to businesses by greatly weakening one of their few remaining defenses against home-town, state-court juries.

WLF believes that its experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this Petition. WLF submits this brief on behalf of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby adopts by reference the Statement contained in the Petition for Writ of Certiorari.

In brief, this case involves efforts by a Louisiana plaintiff to keep his lawsuit against an out-of-state company in the Louisiana courts, and out of the federal courts. His efforts included an attempt to defeat federal court jurisdiction (based on diversity of citizenship between the parties) by adding a neighbor as a defendant despite lacking any intent to pursue a judgment against that neighbor. This case turns on whether the addition of that

neighbor (with the result that complete diversity of citizenship between plaintiffs and defendants no longer existed) destroyed the federal court's diversity jurisdiction.

The underlying lawsuit is a product liability suit filed in November 1987 in Louisiana state court by Respondent Louis J. Barattini against Petitioner Sears, Roebuck & Co. ("Sears"). Mr. Barattini alleges that he severely injured his hand while operating a Sears ten-inch radial saw. The saw belonged to his neighbor, Eric Soileau.

Sears removed the case to federal court on November 23, 1987, and many months of pre-trial discovery followed. On June 24, 1988, less than six weeks before trial was set to begin (on August 1, 1988), Mr. Barattini moved for voluntary dismissal without prejudice, in order to allow him to refile the suit in state court, against both Sears and Mr. Soileau. The federal district court judge accomplished that same result by granting a motion to add Mr. Soileau to the action and thereafter remanding the case to state court. Pet. App. 2a.[1]

Mr. Soileau never filed an answer in the case. Nonetheless, Mr. Barattini never sought a default judgment against Mr. Soileau, nor even sought discovery from him. Instead, Mr. Barattini moved to dismiss Mr. Soileau from the suit in February 1991.[2]

The day after the dismissal was granted, Sears again removed the case to federal court. Mr. Barattini's motion

---

[1] Although Sears is not a citizen of Louisiana, both Mr. Barattini and Mr. Soileau are. Accordingly, the addition of Mr. Soileau as a defendant destroyed the complete diversity of citizenship between plaintiffs and defendants necessary to maintain federal court diversity jurisdiction pursuant to 28 U.S.C. § 1332.

[2] Indeed, Mr. Soileau said in a sworn statement that he had been told by both Mr. Barattini and Mr. Barattini's counsel that they never had had any intention of pursuing their claim against him. Pet. App. 14a-21a.

to remand the case once again to state court was denied by the federal district judge; he held that Mr. Barattini's addition of Mr. Soileau to the suit was a "fraudulent" attempt to defeat diversity jurisdiction. Pet. App. 13a. The district court held that although a claim "conceivably existed under Louisiana law" against Mr. Soileau, that claim was insufficient to defeat diversity jurisdiction because Mr. Barattini had never intended to proceed against Mr. Soileau but rather was engaged in "a blatant attempt to circumvent the federal court's exercise of diversity jurisdiction." *Id.*

The case went to trial in November 1991, resulting in a judgment for Sears. Pet. App. 11a. The United States Court of Appeals for the Fifth Circuit vacated that judgment on June 12, 1992 and remanded the case to the district court with instructions to remand to state court. Pet. App. 10a. The Fifth Circuit held that, for purposes of determining whether the case had properly been removed to federal court, it was irrelevant that Mr. Barattini never intended to pursue a judgment against Mr. Soileau and that his sole purpose in joining Mr. Soileau was to defeat diversity jurisdiction. Pet. App. 8a. The court held that so long as the complaint states a "viable cause of action" against a non-diverse defendant, removal of a case to federal court based on diversity jurisdiction is improper. *Id.* The court held that although removal *can* be permissible following the voluntary dismissal of all non-diverse defendants, it was impermissible in this case because it occurred after expiration of the one-year limitation period for removals imposed by 28 U.S.C. § 1446(b). Pet. App. 4a.[3]

---

[3] The court of appeals held that because the addition of Mr. Soileau was not "fraudulent" (and therefore could be invoked to defeat diversity jurisdiction), it did not need to decide the extent to which 28 U.S.C. § 1446(b)'s one-year limitation period is tolled by the fraudulent addition of a non-diverse defendant. Pet. App. 4a.

Sears thereafter sought review of the Fifth Circuit's decision by filing its certiorari petition.[4] WLF urges the Court to grant that petition.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS'S DECISION SERIOUSLY MISREADS CONGRESSIONAL INTENT IN ADOPTING THE ONE-YEAR LIMITATION PERIOD FOR REMOVAL OF CASES TO FEDERAL COURT

It cannot seriously be disputed that, had the case been decided prior to the 1988 amendments to the federal removal statutes, Sears's removal of the case to federal court would not have been subject to attack. Prior to the 1988 amendments, Sears would have been entitled -- pursuant to 28 U.S.C. § 1446(b) -- to remove the case at any time within 30 days of Mr. Barattini's voluntary dismissal of his claim against Mr. Soileau.[5] Thus, the result reached by the Fifth Circuit can only be correct if Congress intended by its 1988 amendments to reverse the

---

[4] Sears served its petition on counsel for Mr. Barattini by mail on September 10, 1992. Accordingly, *amicus* briefs are timely if filed by October 14, 1992.

[5] Between 1949 and 1988, the second paragraph of § 1446(b) read as follows:

> If the case stated in the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

This Court has long held that the plaintiff's voluntary dismissal of non-diverse defendants renders removable a case that previously would have been removable but for the presence of the non-diverse defendants. *See, e.g., Powers v. Chesapeake & Ohio Railway*, 169 U.S. 92 (1898).

result in cases involving facts similar to those presented in this case.

Congress had no such intent when it amended § 1446(b) as part of the Judicial Improvements and Access to Justice Act of 1988 (the "1988 Act"). Accordingly, the Fifth Circuit's interpretation of § 1446(b) as amended is clearly erroneous.

The 1988 Act added a clause to § 1446(b) such that the provision permitting removal even when the case stated by the initial complaint is not removable is now limited to removal petitions filed within one year of the commencement of the action.[6] The legislative history of the 1988 Act makes clear that Congress did not have cases of this sort in mind when it adopted the one-year limitation on removals. The House Report on the amendment to § 1446(b) states that the limitation period was imposed "as a means of reducing the opportunity for removal after substantial progress has been made in state court." H.R. Rep. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032 (1988). The House Report went on to explain:

> The result [of the amendment to § 1446(b)] is a modest curtailment in access to diversity jurisdiction. The amendment addresses problems that arise from a change of parties as an action progresses toward trial in state court. The elimination of parties may create *for the first time* a party alignment that supports diversity jurisdiction. Under § 1446(b) removal is possible whenever this event occurs, so long as the change

---

[6] The language added to § 1446(b) by the 1988 Act provides as follows:

> . . . except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [providing for diversity jurisdiction] more than 1 year after commencement of the action.

> in parties was voluntary as to the plaintiff. Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove. Removal late in the proceedings may result in substantial delay and disruption.

Id. at 6032-6033 (emphasis added).

There is no claim that Sears delayed a trial by removing the case to federal court; accordingly, the purposes underlying the 1988 Act's one-year limitation period are not implicated in this case. Indeed, it was Respondent Barattini who needlessly delayed and disrupted these proceedings by -- on the eve of a federal court trial after substantial progress had been made on discovery matters -- joining a non-diverse defendant for the sole purpose of destroying diversity jurisdiction and thereby obtaining a remand to state court.

Moreover, Sears is in literal compliance with the amended language of § 1446(b): it did, in fact, first remove the case (on November 23, 1987) within one year of commencement of the action (on November 4, 1987). Nothing in amended § 1446(b) states that the requirements of the one-year limitation period can only be met by a timely filing of the *last* removal petition; so long as Sears properly filed *a* removal petition based on diversity of citizenship within one year of commencement of the action (and it did so), nothing in § 1446(b) prevents the filing of a subsequent removal petition when the other conditions of § 1446(b) are met.

Furthermore, limitation periods imposed by § 1446(b) have always been considered not to be "jurisdictional" in nature and thus to be subject to extension under appropriate circumstances. *See, e.g., Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 n.4 (7th Cir. 1992); 1A *Moore's Federal Practice* ¶ 0.168[3.-5-7] at 601 (1985). It is difficult to imagine a more appropriate case in which to permit the filing of a second removal petition more than

one year after commencement of the action than when: (1) it is the *plaintiff* who has delayed trial by obtaining a remand on the eve of a scheduled trial in federal court; (2) the plaintiff's addition of a non-diverse was for no purpose other than to destroy diversity among the parties and thus force a remand; and (3) the second removal petition, filed after the plaintiff had revealed his hand by failing to pursue his action against the non-diverse defendant and later voluntarily dismissing the action, did not result in last-minute delay of a state-court trial.

In sum, regardless whether Mr. Barattini was guilty of "fraudulent joinder" -- as that term has traditionally been understood -- in adding Mr. Soileau as a defendant, Sears was acting well within its rights under 28 U.S.C. § 1446(b) in filing a second removal petition in this case. The Fifth Circuit's contrary interpretation of amended § 1446(b) was based on a serious misreading of the language and purposes of that statute. The Court should grant certiorari to correct that error.

II. MR. BARATTINI'S JOINDER OF MR. SOILEAU AS A DEFENDANT FOR THE SOLE PURPOSE OF DEFEATING DIVERSITY JURISDICTION WAS "FRAUDULENT" AS THAT TERM HAS TRADITIONALLY BEEN UNDERSTOOD

This Court has long recognized that federal court removal jurisdiction is not defeated by the "fraudulent joinder" of a defendant added by the plaintiff solely for the purpose of destroying complete diversity of citizenship among the parties. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921).

Indeed, the Fifth Circuit in this case recognized the existence of a "fraudulent joinder" exception to the complete diversity requirement normally applicable to removal petitions based on diversity jurisdiction. Nonetheless, the court of appeals defined that exception in an inappropriately narrow fashion. The court held:

> In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

Pet. App. 5a (quoting *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. Unit A 1981)(emphasis in original).

Applying that definition of "fraudulent joinder" to this case, the Fifth Circuit found that Mr. Barattini's joinder of Mr. Soileau as a defendant was not fraudulent. The court of appeals held (and Sears did not seriously contest) that the amended complaint stated a viable cause of action against Mr. Soileau and that the jurisdictional facts alleged by Mr. Barattini were not fraudulent (*i.e.*, Mr. Soileau really was, as alleged, a citizen of Louisiana). Pet. App. 5a-9a.

The Fifth Circuit's definition of what constitutes "fraudulent joinder" is in clear conflict with this Court's *Wilson* decision as well as more recent decisions from other courts of appeals. *Wilson* involved facts remarkably similar to those in this case. The plaintiff in *Wilson* (an Alabama citizen) sued his employer (not an Alabama citizen) for injuries sustained on the job. Also named in the complaint was one of the plaintiff's fellow employees (also an Alabama citizen), who was alleged to be liable for the plaintiff's injuries based on a common law negligence theory.

Wilson came to the Court on the question of whether the employer properly removed the case to federal court on the basis of diversity jurisdiction. There was no indication in the Court's opinion that the plaintiff had flunked the Fifth Circuit's standards; *i.e.*, that the plaintiff had failed to state a viable cause of action against his fellow employee or that the fellow employee was not really

an Alabama citizen. The Court nonetheless held that the plaintiff had been guilty of "fraudulent joinder" in adding his fellow employee as a defendant, because he was added "without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the employer's right of removal." *Wilson*, 257 U.S. at 98. In other words, joinder is "fraudulent" (and thus does not defeat removal) whenever (as the district court found to be true here) the non-diverse defendant was added without any purpose of prosecuting the action in good faith -- regardless whether the complaint states a viable cause of action against the non-diverse defendant.

The Fifth Circuit standard is also at odds with leading commentators and with recent decisions from other courts of appeals. *See, e.g.*, 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3723 at 613-17 (1976)("A party will be considered fraudulently joined when plaintiff has not stated a claim for relief or *does not intend to secure a judgment*")(emphasis added); *Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26, 32 (3d Cir. 1985)("Courts have found joinder to be fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment*")(emphasis added).

In sum, the Fifth Circuit's crabbed definition of "fraudulent joinder" is in conflict with the definitions employed both by this Court in *Wilson* and by other courts of appeals. The Court should grant certiorari in order to resolve that conflict.

III. THE COURT OF APPEALS'S DECISION DEPRIVES OUT-OF-STATE DEFENDANTS OF A MUCH-NEEDED SHIELD AGAINST HOME-TOWN VERDICTS

A basic misconception that permeates the Fifth Circuit's decision in this case is that its task consists of

nothing more than ensuring the efficient allocation of litigation between the state and federal courts. Missing from the court of appeals's analysis is any recognition of the basic rationale underlying the existence of federal court removal jurisdiction: to protect out-of-state defendants from the bias that state courts may harbor in favor of in-state plaintiffs. *See* 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3721 at 515 (1976) ("the right of removal probably was designed to protect nonresidents from the local prejudices of state courts").[7]

Indeed, WLF is filing this brief not out of any abstract interest in arcane federal court jurisdictional provisions, but due to its repeated observation of state-court bias in favor of in-state plaintiffs suing out-of-state defendants, particularly when the defendant is a business entity and is perceived as being deep-pocketed. There is no reason to suspect that state court judges and juries are any less biased against out-of-state defendants than they were at the time that removal jurisdiction based on diversity of citizenship was first adopted in 1875.[8] Such a bias makes perfect economic sense: requiring an out-of-state defendant to pay damages to an in-state plaintiff brings added revenues into the forum state and has very little down side. While the out-of-state business entity that is harmed by the damage award may be forced out of business or otherwise be forced to lay off employees, the employees in all probability are from another state.

---

[7] That removal jurisdiction was designed to protect out-of-state defendants from local prejudices of state courts is borne out by the provision limiting the right of removal based on diversity of citizenship to defendants who are *not* citizens of the forum state. 28 U.S.C. § 1441(b).

[8] The high frequency with which this Court must deal with Commerce Clause challenges to state government bias against out-of-state firms is a testament to the natural tendency of states and their citizens to discriminate against out-of-state business entities. Often, that bias is reflected in state-court procedural rules, such as state-court venue provisions. *See, e.g., Burlington Northern R. Co. v. Ford*, 112 S. Ct. 2184 (1992).

Small businesses are likely to be particularly affected by this built-in state-court bias against out-of-state defendants. Large corporations often are better positioned to absorb the costs associated with state-court bias as a regular cost of doing business and frequently will be in a position to spread the costs to the consuming public by building those costs into their pricing structure. Small businesses rarely have that luxury, both because they often are unable to obtain adequate liability insurance and because they are less likely than larger corporations to have significant control over their pricing structure.

WLF recognizes that there need to be limits on a defendant's right to challenge the propriety of the joinder of non-diverse defendants; otherwise, courts will become bogged down in lengthy evidentiary hearings into the plaintiff's subjective intent in joining a particular defendant. Such hearings would not be a wise use of judicial resources. Moreover, the burden of proof should be quite high on any defendant who challenges joinder on the ground that the plaintiff has no subjective intent of proceeding to judgment against the non-diverse defendant.

But when, as here, the defendant has introduced conclusive proof of such intent, the courts should not hesitate to label the plaintiff's action a "fraudulent joinder" and to recognize the substance, rather than the form, of that action. Otherwise, Congress's inclusion of a one-year limitation period on removal petitions -- while intended solely to prevent last-minute disruptions of imminent state-court trials -- will be turned into a powerful weapon for in-state plaintiffs who seek to deny defendants their removal option; and the plaintiffs who will be most rewarded will be those clever enough to hide their fraud for more than one year.

In sum, the tremendous danger of prejudice to out-of-state defendants created by the Fifth Circuit's decision -- a danger exacerbated by the 1988 Act's creation of a one-year limitation period for removal petitions -- counsels in

favor of granting Sears's petition for certiorari to resolve the conflict between the Fifth Circuit's decision and other court decisions in this area.

CONCLUSION

For the foregoing reasons, WLF respectfully submits that the petition should be granted.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

October 14, 1992